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CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

LOPLEAN CARRELL CURTIS,

Defendant - Appellant.

No. 07-10179

D.C. No. CR-05-00526-FCD

MEMORANDUM^{*}

Appeal from the United States District Court
for the Eastern District of California
Frank C. Damrell, District Judge, Presiding

Argued and Submitted November 7, 2007
San Francisco, California

Before: SCHROEDER, Chief Judge, HALL and BYBEE, Circuit Judges.

Federal prisoner Loplean Carrell Curtis appeals his sentence after pleading guilty to being a felon in possession in violation of 18 U.S.C. § 922(g)(1). At sentencing, the district court added three criminal history points after determining that (1) Curtis' prior conviction resulted in a sentence in excess of thirteen months

^{*} This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

and (2) the resulting incarceration extended to within fifteen years of Curtis' arrest. As a result, the district court sentenced Curtis to thirty months in prison.

On appeal, Curtis argues that his "Johnson waiver" in California state court prevented the district court from concluding that his prior sentence exceeded thirteen months. This argument is meritless.

U.S.S.G. § 4A1.1(a) requires a district court to assess three criminal history points where the defendant received a prior "sentence of imprisonment" exceeding thirteen months. The district court correctly added together the 365 days Curtis spent in jail as his condition of probation and the 170 days he spent in jail as a result of his probation violation to conclude that Curtis was sentenced to more than thirteen months for his prior cocaine offense. See U.S.S.G. § 4A1.2(k)(1); United States v. Latimer, 991 F.2d 1509, 1511 (9th Cir. 1993). Because Curtis was released from post-violation confinement less than fifteen years before he was arrested for being a felon in possession, the district court correctly concluded that the prior sentence of imprisonment fell within fifteen years of the commencement of Curtis' instant offense. See U.S.S.G. § 4A1.2(k)(2)(B); Latimer, 991 F.2d at 1511.

Curtis' Johnson waiver does nothing to alter this analysis. The Johnson waiver "is a waiver of a statutory right to credit for time served" on a prior sentence. People v. Arnold, 92 P.3d 335, 342 (Cal. 2004). Under California law,

when a defendant violates probation after having previously spent one year in county jail as a condition of probation, a California trial judge may not order the defendant to return to jail as a condition of continued probation, but must either order him to prison or give him no sentence at all unless the defendant gives a Johnson waiver. See People v. Johnson, 147 Cal. Rptr. 55, 58 (Ct. App. 1978).

After Curtis violated his probation, he provided a Johnson waiver of the credits he earned while serving his original one-year term in jail. On February 18, 1993, the Superior Court reinstated his probation and sentenced him to an additional 170 days in jail.

The Johnson waiver thus allowed Curtis to avoid a possible prison sentence by waiving his state statutory right to credit for time served. It did not eliminate his prior sentence for purposes of sentencing under the U.S.S.G.

The judgment of the district court is **AFFIRMED**.